FILE COPY

NOV 21 1946

No. 60

In the Supreme Court of the United States

OCTOBER TERM, 1946

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

A. J. TOWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

INDEX

	Page
I. The Board had "jurisdiction" to issue the order here in question	7
II. The Board's finding in the instant case that the union represented a majority of respondent's employees in an appropriate bargaining unit was reached in accordance with the procedural requirements of the Act	9
III. None of the actions of the Board or any of its agents in the instant case constituted an abuse of discretion	15
IV. The Board is not relying in this court on any ground not stated in its decision	24

CITATIONS

Cases:

Allis Chalmers Manufacturing Co., Matter of, 70 N. L. R. B. 348, 18 L. R. R. M. 1353	6
Carroll, William H., Matter of, 29 N. L. R. B. 343	12
Central Missouri Telephone Co., Matter of, 15 N. L. R. B. 798	12
Chrysler Corp., Matter of, 63 N. L. R. B. 866	21
Gluck Bros., Inc., Matter of, 52 N. L. R. B. 1144	23
May Department Stores Co. v. *National Labor Relations Board*, 326 U. S. 376	16
National Labor Relations Board v. *Appalachian Electric Power Co.*, 140 F. 2d 217	4
National Labor Relations Board v. *Botany Worsted Mills, Inc.*, 133 F. 2d 876, certiorari denied, 319 U. S. 751	4
National Labor Relations Board v. *William H. Carroll*, 120 F. 2d 457, enforcing 29 N. L. R. B. 343	10, 12
National Labor Relations Board v. *Central Missouri Telephone Co.*, 115 F. 2d 563, enforcing 15 N. L. R. B. 798	10, 12
National Labor Relations Board v. *Century Oxford Manufacturing Corp.*, 140 F. 2d 541, certiorari denied, 323 U. S. 714	4
National Labor Relations Board v. *Falk Corp.*, 308 U. S. 453	16
National Labor Relations Board v. *Fickett-Brown Manufacturing Co.*, 140 F. 2d 883, enforcing 52 N. L. R. B. 32	10
National Labor Relations Board v. *Gerling Furniture Mfg. Co.*, 103 F. 2d 663	10

722137—46——1

Cases—Continued Page

National Labor Relations Board v. *J. L. Hudson Co.*, 135 F. 2d 380, certiorari denied, 320 U. S. 740 ..... 9, 10, 11

National Labor Relations Board v. *Henry Levaur, Inc.*, 115 F. 2d 105, enforcing 17 N. L. R. B. 1034, certiorari denied, 312 U. S. 682 ..... 10, 12

National Labor Relations Board v. *National Mineral Co.*, 134 F. 2d 424, certiorari denied, 320 U. S. 753 14

National Labor Relations Board v. *Pure Oil Co.*, 103 F. 2d 497, enforcing 6 N. L. R. B. 818 ..... 10, 13

National Labor Relations Board v. *Waterman Steamship Corp.*, 309 U. S. 206 16

National Labor Relations Board v. *West Kentucky Coal Co.*, 152 F. 2d 198, certiorari denied, No. 1198, October Term, 1945 6

National Labor Relations Board v. *Whittier Mills Co.*, 111 F. 2d 474 ..... 4, 14

Norris, Inc., Matter of, 63 N. L. R. B. 502 21

Pittsburgh Plate Glass Co., Matter of, 8 N. L. R. B. 1210, enforced, 102 F. 2d 1004 14

Pittsburgh Plate Glass Co. v. *National Labor Relations Board*, 313 U. S. 146 ..... 6, 9, 14, 15

Pure Oil Co., Matter of, 6 N. L. R. B. 818 13

Southern Steamship Co. v. *National Labor Relations Board*, 316 U. S. 31 16

Sun Ship Employees Ass'n v. *National Labor Relations Board*, 139 F. 2d 744 17

Valley Mould & Iron Corp. v. *National Labor Relations Board*, 116 F. 2d 760, certiorari denied, 313 U. S. 590 4

Virginian Railway Co. v. *System Federation No. 40*, 300 U. S. 515 ..... 2, 3, 13

Walker Vehicle Co., Matter of, 7 N. L. R. B. 827 18

Statute:

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*):

Sec. 9 ..... 7, 8, 22

Miscellaneous:

National Labor Relations Board Rules and Regulations ... 17, 24

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 60

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

A. J. TOWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

I

THE BOARD HAD "JURISDICTION" TO ISSUE THE ORDER HERE IN QUESTION

Respondent rests its case largely on the theory that before the Board can find that an employer has unlawfully refused to bargain with a duly selected representative of the employees in an appropriate bargaining unit, it must find that the representative has been chosen in literal compliance with the statutory phrase, "by a majority of the employees in the unit" and that the union in this case was not so chosen (Resp. Br., pp. 6,

7, 10, 12, 13, 24–25, 42, 43). In advancing this theory, respondent ignores or evades both its necessary corollaries and the fact that it has already been rejected by this Court and by several of the circuit courts of appeals.

A. As noted in our main brief (pp. 27–29), this Court has already held that the statutory requirement of a choice by a "majority * * * of employees" in the Railway Labor Act need not be read so literally as to require rejection of the results of an election in which a majority of those voting, though less than a majority of the employees affected, made an effective choice. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 559–561. The same rule has been applied under the National Labor Relations Act by every circuit court of appeals which has passed on the subject (Bd. Br., p. 28, n. 7), and respondent does not question this doctrine. These cases, without more, refute Point I of respondent's argument, which is that "The Board is without jurisdiction to find the respondent guilty of an unfair labor practice unless the employer has refused to bargain with a representative chosen by a majority of the employees in the unit" (Resp. Br., p. 7).

Respondent attempts to distinguish the *Virginian Railway* case on the ground that while the words of the statute need not be applied literally where the asserted defect is the absence of an affirmative designation of the union by a majority

of the affected employees, it must be read literally, and as creating a "jurisdictional" requirement, where the asserted defect is that one of the voters may have been ineligible to vote (Resp. Br., pp. 25–26). This Court's decision in the *Virginian Railway* case was not so narrow. It rested on the theory that the provision in the Railway Labor Act for ascertaining the choice of the majority must be analogized to political elections (300 U. S. at p. 560). If the same analogy is made to the facts in this case, there can be no doubt as to the outcome. See Bd. Br., pp. 48–49.

The weakness of respondent's extreme position may be seen in the fact that it leads it to assert that "A certification once made is always subject and open to the attack that the bargaining agent has lost its majority status" (Resp. Br., p. 32). This theory has been uniformly rejected by the circuit courts of appeals. They have held rather that the Board may adopt reasonable rules respecting the duration of the validity of its certifications, such as that they cannot be called into question for a year or other reasonable period after issuance, in the absence of special circumstances; accordingly, they have held that the Board has jurisdiction, consistently with such rules, to find that an employer has illegally refused to bargain with a duly certified union, even where it is alleged that the union has lost its majority shortly after the certification and prior to the employer's refusal to bargain with it or the

occurrence of any other unfair labor practices. *National Labor Relations Board* v. *Century Oxford Manufacturing Corp.*, 140 F. 2d 541, 542–543 (C. C. A. 2), certiorari denied, 323 U. S. 714; *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 881–882 (C. C. A. 3), certiorari denied, 319 U. S. 751; *National Labor Relations Board* v. *Appalachian Electric Power Co.*, 140 F. 2d 217, 220–222 (C. C. A. 4); *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. 2d 474, 478 (C. C. A. 5). See also *Valley Mould & Iron Corp.* v. *National Labor Relations Board*, 116 F. 2d 760, 764–765 (C. C. A. 7), certiorari denied, 313 U. S. 590.[1]

---

[1] In the *Whittier Mills* case, the Circuit Court of Appeals for the Fifth Circuit said (111 F. 2d at p. 478; italics supplied):

"The employer is, in theory at least, not much concerned, since the employees are to choose their representative unhindered. *So long as the employees make no contention that they are not correctly represented, it would seem that the employer could safely continue to deal indefinitely with the designated bargaining agent.* In the present case the employees have not protested at all, and the employer has raised the question belatedly. Assuming the question duly raised, the Board decided it adversely. *There is no certain evidence that a majority of the present employees do not now desire representation by the Committee.* Many persons who were employees a year and a half ago had ceased to be, but it cannot be assumed that all of these were either assenters to or dissenters from the selection of the Committee. On the other hand the newly signed union cards do not prove a gain in assents, for the signers may have voted originally for the Committee. The present wishes of a majority of the employees are not established either way."

B. Respondent asserts that a finding of majority choice cannot be established by waiver or estoppel (Br., pp. 10, 15). Carried to its logical extreme, its contention would mean that after the Board had held an election, issued a certification, issued a complaint, held a hearing, rendered a decision, and petitioned a circuit court of appeals for enforcement, and perhaps even after the court had issued a decree of enforcement, the employer could still raise for the first time the issue whether individuals who voted in the election were not in fact employees. Respondent, of course, makes no such claim, and it would no doubt concede that its right to raise new issues expired at some point in these proceedings. But if any term may be placed on the right of parties to raise new issues, it cannot be said that its exclusion after any particular point creates either a "fiction" (Resp. Br., p. 15) or a jurisdictional defect. Hence the sole question in this case is whether the Board placed a reasonable limit on the right to raise the issue of eligibility. For the reasons stated in our main brief, we believe that it did.

Respondent further argues that Congress, by providing judicial review only after the Board had conducted an unfair labor practice proceeding, must have intended that questions of this kind could be raised as late as the hearing in an unfair labor practice proceeding based on a prior certification, and, therefore, could not have re-

quired that eligibility issues be raised before a ballot is cast (Resp. Br., pp. 24, 31–32). This Court has already held that the Board may refuse to try in an unfair labor practice proceeding issues which were or could have been tried in a prior representation proceeding. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146, 158–161. The principle thus laid down was recently applied by the Circuit Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *West Kentucky Coal Co.,* 152 F. 2d 198, 200–201, certiorari denied, No. 1198, October Term, 1945.[2] The necessity for this rule is clear. As the Board has recently held (*Matter of Allis Chalmers Manufacturing Co.,* 70 N. L. R. B. 348, decided August 26, 1946, 18 L. R. R. M. 1353):

> Considerations of public policy require that when the Board's authority is invoked for the determination of an appropriate bargaining unit, it be provided with all the facts necessary to an informed and intelligent discharge of its responsibilities. * * * To permit successive opportunity to adduce unit evidence would tend to render representation proceedings meaningless, encourage the withholding of evidence, and invite parties to ignore representation hearings altogether.

[2] These cases dispose of respondent's contention that the unfair labor practice proceeding was "the earliest time at which the respondent could raise the question in such way as to obtain Court review" (Resp. Br., p. 24; see also p. 32).

In the preceding cases the evidence offered was addressed to the question of the appropriate bargaining unit. The decisions, however, make it clear that the postponement of judicial review of the representation issues until after the unfair labor practice proceeding does not prevent the Board from treating the failure to raise an issue at the appropriate stage of the representation proceedings as barring any future raising of the issue. Moreover unit questions are just as much and just as little a matter of jurisdiction as questions of employee status. The Board here expressly noted that cases involving post-election challenges, based on the claim that voters were not within the appropriate unit, are indistinguishable from the case at bar (R. 12, note 3).[3] Section 9 (a) of the Act requires that the exclusive bargaining representative be chosen by a majority "of the employees *in a unit appropriate*" for collective bargaining (italics supplied). This language im-

[3] Former Board Member Reilly has suggested a distinction on the ground that the Board has "broad discretion" in determining bargaining units (Resp. Br., pp. 15–16). However, the Board has just as much discretion in determining which individuals are employees for the purpose of selecting the bargaining agent. As shown in our main brief (p. 34, n. 12), there are many cases which require full exercise of the Board's administrative expertise to determine the scope of the electoral body. Congress certainly did not intend that, in such cases, parties could raise questions concerning each of the voters in the election at any time after the election was conducted.

722137—46——2

poses as much of a jurisdictional requirement as does the provision requiring choice "by the majority of the employees in a unit". Under the respondent's theory, consequently, the cases cited *supra*, p. 6, were incorrectly decided.

C. Respondent insists that it is not necessary in this case to decide whether the rule which it urges would open the door to such abuses as deliberately holding back known challenges until after an election, and making such challenges, either previously known or newly discovered, long after the election (Resp. Br., pp. 18, 30, 31). Respondent does argue that, at least in the hearing in the unfair labor practice proceeding, and perhaps later, any party would be free to raise these and other issues, such as whether the unit previously found by the Board was appropriate, and whether employees who voted in the election were in fact within the unit, as well as any of the other issues which the Board must pass on before issuing a certification (Br., p. 32). Any party would be free, furthermore, to withhold evidence on these issues deliberately and with the intention of rendering the Board's certifications defective. But there is nothing in the statute which requires the conclusion that Congress intended to make the formal representation proceeding which it provided for in Section 9 (c) of the Act so meaningless.

II

THE BOARD'S FINDING IN THE INSTANT CASE THAT THE UNION REPRESENTED A MAJORITY OF RESPONDENT'S EMPLOYEES IN AN APPROPRIATE BARGAINING UNIT WAS REACHED IN ACCORDANCE WITH THE PROCEDURAL REQUIREMENTS OF THE ACT

A. The Board here found that the Union had been chosen by a majority of the employees in the appropriate bargaining unit as their representative and that it was therefore the statutory exclusive bargaining representative (R. 11, 28). To the extent that in reaching this finding the Board accepted the ruling of its regional director as final if not arbitrary, it was acting with the consent of all parties, including respondent (R. 104). Respondent nevertheless now argues that, in so acting, the Board failed to comply with a statutory requirement necessary to its jurisdiction; that is, that such findings be made by the Board alone (Resp. Br., pp. 48–51, 52, 56–58). This argument is disposed of by the many cases in which courts have entered decrees based on Board orders issued upon consent of the parties. In such cases, not only a finding of majority representation but findings by the Board of any of the facts constituting unfair labor practices may be totally lacking. Yet the validity of such orders has been consistently upheld. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146, discussed *infra,* pp. 14–15; *National Labor Relations*

Board v. *J. L. Hudson Co.*, 135 F. 2d 380 (C. C. A. 6), enforcing 42 N. L. R. B. 536, certiorari denied, 320 U. S. 740; *National Labor Relations Board* v. *Central Missouri Telephone Co.*, 115 F. 2d 563 (C. C. A. 8), enforcing 15 N. L. R. B. 798; *National Labor Relations Board* v. *Fickett-Brown Manufacturing Co.*, 140 F. 2d 883 (C. C. A. 5), enforcing 52 N. L. R. B. 32 (parties stipulated that the Board may make the findings made by the Trial Examiner); *National Labor Relations Board* v. *Henry Levaur, Inc.*, 115 F. 2d 105 (C. C. A. 1), enforcing 17 N. L. R. B. 1034, certiorari denied, 312 U. S. 682; *National Labor Relations Board* v. *William B. Carroll*, 120 F. 2d 457 (C. C. A. 1), enforcing 29 N. L. R. B. 348; *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. 2d 497 (C. C. A. 5), enforcing 6 N. L. R. B. 818; *National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. 2d 663 (C. C. A. 7).

In the *Hudson* case, the employer entered into a stipulation waiving the hearing called for by the Act as well as the right to Board findings of fact, save as to the applicability of the Act to its operations. It also waived the right to contest entry of a court decree except on the ground of inapplicability of the Act. 135 F. 2d at p. 383. However, when the Board sought enforcement of its order in the circuit court of appeals, the employer contended that since the Board had made no finding that the employer had engaged in un-

fair labor practices leading or tending to lead to strikes burdening commerce, the Board's jurisdiction had not been shown (*id.* at pp. 381–382).[4] The Circuit Court of Appeals for the Sixth Circuit rejected this contention in a decision which convincingly demonstrates the soundness of the Board's position here (*id.*, at p. 384):

> No valid reason appears why the Board should be required, in the face of such clear-cut stipulation, to do more than was demanded by the stipulation upon which the case was tried, that is, to determine whether the National Labor Relations Act was applicable to the respondent and its employees. This duty the Board performed with care, as is evidenced by its reasoning and the authorities cited for its conclusion that The J. L. Hudson Company is subject to the Act. The salient stipulated facts, which were sketched at the outset of this opinion, impel us to the same conclusion as that reached by the Board.
>
> Hindrance rather than aid would be given to *expeditious and inexpensive procedure before the National Labor Relations Board* were the Courts of Appeals, being

[4] The issue, as stated by the employer in his subsequent petition for a writ of certiorari (No. 114, October Term, 1943, pp. 10–11), was, "Whether findings by the Board of the existence of such unfair labor practices and that they affect commerce to burden or obstruct it, or have led or tend to lead to a labor dispute burdening or obstructing commerce or the free flow thereof, can be waived by the parties in a given case."

> vested with jurisdiction to enforce or to deny enforcement of the Board's orders, to say that an employer may not *lawfully waive the requirement which would otherwise exist, that the Board make findings of fact with respect to unfair labor practices,* or that the antagonists may not stipulate concerning the order to be entered by the Board, with its approval.
>
> Stipulations are favored in law; and there is authority for the procedure followed by the Board in the instant labor controversy. [Italics supplied.]

In the *Central Missouri* case, *supra,* a similar contention was rejected by the court on the ground that the employer had "expressly waived its right to findings of fact by the Board" (115 F. 2d, at p. 567). The court so ruled despite the fact that the stipulated order required the Company to bargain collectively with a named union as the representative of its employees, and the Board had made no finding that the union represented a majority of the employees. *Matter of Central Missouri Telephone Co.*, 15 N. L. R. B. 798, 801, 805–806. The same situation prevailed in the *Levaur* and *Carroll* cases, *supra,* where the parties stipulated, but the Board did not find, that the union named in the Board's order represented a majority in the stipulated bargaining unit. *Matter of Henry Levaur, Inc.*, 17 N. L. R. B. 1034, 1037, 1040, 1043, 1048–1051; *Matter of William H. Carroll*, 29 N. L. R. B. 343, 345, 349–

350. In the *Pure Oil* case, *supra,* the order of the Board which the court enforced was based on a stipulation which required the employer to disestablish a named organization which purported to represent the employees. *Matter of Pure Oil Co.,* 6 N. L. R. B. 818, 822.

If parties can waive the right to independent consideration by the Board of the entire question of unfair labor practices, they may do so as to one aspect of that question. We submit, therefore, that in view of its express commitment on this very point, respondent is in no position to raise the fifth question set forth in its brief at pp. 2–3; that is, whether the Board can make the rulings of its regional directors final in the case of consent elections.

B. For similar reasons, respondent is in no position to rely on the fact that none of the employees who voted against the Union joined in the consent election agreement (Resp. Br., pp. 2, 11–12). Respondent was aware when it entered into the agreement that employees were not parties. It ill behooves it now to attempt to escape the binding effect of this agreement by raising the alleged rights of employees who themselves assert no such rights here. Moreover, it is well settled that an employer can complain only of the infringement of its own rights, not those of its employees. *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 558. See also

National Labor Relations Board v. *National Mineral Co.*, 134 F. 2d 424, 426-427 (C. C. A. 7), certiorari denied, 320 U. S. 753. No employee contended before either the Board or the court below that the Union was not designated by a majority of the employees. Here, as in the *Whittier Mills* case, *supra*, "There is no certain evidence that a majority of the present employees do not now desire representation" by the Union.

A similar issue was ruled on by this Court in *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146. In that case the Board, without making any unfair labor practice findings, issued an order which, with the consent of the employer, directed it to withdraw recognition from a labor organization named the Crystal City Union. *Matter of Pittsburgh Plate Glass Co.*, 8 N. L. R. B. 1210. The Crystal City Union was not a party to the stipulation providing for entry of the order. 8 N. L. R. B., at p. 1211. The order was enforced by the Circuit Court of Appeals for the Eighth Circuit. 102 F. 2d 1004. In subsequent proceedings, in which determination of the appropriate bargaining unit for the Company's employees came before the Board, the Board held that in view of the prior unfair labor practice proceeding and the consent decree, the Crystal City Union could "no longer function as a labor organization" and that hence, "its wishes [as to the appropriate bargaining unit] are im-

material" (10 N. L. R. B. 1111, 1118). In its subsequent decision, in which it ordered the employer to bargain with another union, it held that, in view of the consent decree, negotiations between the employer and the Crystal City Union could not be treated as free collective bargaining nor could membership in that union be considered as evidence of a free choice by the employees. 15 N. L. R. B. 515, 523. When the case reached this Court, it was urged that the Board should have retried the issue of whether the Crystal City Union was in fact company-dominated and that it should have allowed that union to produce evidence on that point. 313 U. S., at pp. 158–159. This Court held that "The entry of the order upon stipulation and consent does not detract from its force." 313 U. S., at p. 159.

III

NONE OF THE ACTIONS OF THE BOARD OR ANY OF ITS AGENTS IN THE INSTANT CASE CONSTITUTED AN ABUSE OF DISCRETION

Once the jurisdictional facing of respondent's argument is removed, it becomes clear that its position is no more than that the Board abused its discretion in refusing to go into the question of Mrs. Kane's eligibility after her vote had been commingled. Thus it argues that the Board misinterpreted its own rule about challenges (Resp. Br., pp. 21–23, 27–29), that in any case the rule

is undesirable (*id.* at pp. 12–14), that it permits abuses by unions (*id.* at pp. 29–30), and that it unduly protects the secrecy of the ballot (*id.* at pp. 32–35). We submit that respondent has fallen far short of the requirement for demonstrating arbitrariness or caprice.

A. This Court has held that "The Board enjoys a wide discretion in determining the procedure necessary to insure the fair and free choice of bargaining representatives by employees." *Southern Steamship Co.* v. *National Labor Relations Board,* 316 U. S. 31, 37. Accord: *National Labor Relations Board* v. *Waterman Steamship Corp.,* 309 U. S. 206, 226; *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 458; *May Department Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, 380. Respondent appears to argue that this discretion in representation proceedings under Section 9 does not survive into subsequent unfair labor practice proceedings under Section 10 and that hence it is irrelevant here (Resp. Br., pp. 7, 24–25). The cases just cited leave no room for attributing to Congress the novel intention of giving the Board wide discretion in representation proceedings only to have that discretion ignored when the results of such proceedings are put in issue in unfair labor practice proceedings.[5]

[5] While we do not believe it is material to the issues in this case, because the Board's discretion regarding the determination of employee representatives exists in complaint

B. Exercising a judgment based on the holding of thousands of elections, the Board has adopted a policy of excluding post-election challenges. That policy is applicable to consent elections held in accordance with its rules and regulations. Respondent's case, however, rests in large part on the theory that the Board has no such rule or that in any case it was not applicable to the con-

---

proceedings even where the question of the employees' choice has not been determined in a prior representation proceeding, respondent is incorrect in asserting that the consent election agreement and the proceedings held thereunder were "private and unofficial" (Resp. Br., pp. 44–47). In *Sun Ship Employees Association* v. *National Labor Relations Board*, 139 F. 2d 744 (C. C. A. 3), on which respondent relies, the consent agreement involved was executed on June 22, 1943 (Appendix to the Association's brief in the circuit court of appeals, p. 10a). At that time, the Board's Rules and Regulations contained no provision governing the holding of consent elections. See National Labor Relations Board Rules and Regulations, Series 2, as amended, effective October 28, 1942. The circuit court of appeals accordingly rested its conclusion that the consent election agreement was a private matter on the ground that "the agreements therein contained were those of the parties themselves, neither imposed upon them by any public body, statute *or regulation*, nor deriving their vitality from such sources" (139 F. 2d at p. 745; italics supplied). On November 26, 1943, however, the Board revised its rules and regulations in several respects. The new rules issued at this time, Series 3, for the first time contained regulations governing consent elections (Board's main brief, Appendix, pp. 81–82). Consent election agreements entered into under these rules must have "the approval of the Regional Director" (*id.*, p. 82). It is clear, therefore, that the action of the regional director in the instant case was taken on behalf of the Board and not as a private party, and that the Board so regarded it.

sent election here (Resp. Br., pp. 21–24, 27–29, 36–40, 42–43). There is no basis for this assertion.

Paragraph 6 of the consent election agreement in this case provides for participation in the election of authorized observers representing all parties and that they shall be permitted to participate in order to "challenge the eligibility of voters" (R. 105). Respondent ignores this paragraph and attempts to concentrate attention on paragraph 7 which provides for the filing of objections within five days and also provides for the filing of a report on objections and a report on challenges (*ibid.*). The objections which may be made within five days under this paragraph are of two kinds. The first of these, objections "to the conduct of the ballot", is obviously not involved here. This phrase applies only to what may be termed the mechanics of the election, the form of the ballot, electioneering near the polls, and the like.[8] The second phrase, which covers objections "to a determination of representatives based on the results" of the ballot, applies not to a question concerning the results of the election, which is what is involved here, but to questions concerning the propriety of issuing a determination of representation based thereon. Moreover, an objection of either of these types which is otherwise within the terms of the five-day rule, but which could have been raised before or at the election,

[8] *Matter of Walker Vehicle Co.*, 7 N. L. R. B. 827, 833.

may be deemed waived by failure so to raise it (Bd. Br., pp. 71–73).

Respondent, however, construes paragraph 7 of the agreement as inviting parties to withhold challenges at the time of the election and to file them at any time during the following five-day period, after all votes have been commingled; it construes the paragraph as permitting this procedure even where the parties knew of the alleged ineligibility at the time of the election (see particularly Resp. Br., pp. 27–28). This interpretation attributes to the Board the intention of making paragraph 6 a dead letter and of encouraging parties to ignore altogether their right to have watchers at the polls. The Board's rules and its practice thereunder refute this inplausible interpretation. Respondent's interpretation receives no strength from the fact that the Chrysler Corporation, which, like respondent, has asked the Board to accept a post-election challenge, follows the practice of sending no observers to the polls (Resp. Br., p. 37, footnote). The answer is that it should. Its refusal to avail itself of the rights provided by the Board's regulations does not require that it be given other rights as a substitute.

We submit that, as shown in our main brief, paragraphs 6 and 7 of the consent election agreement clearly prohibited post-election challenges (pp. 68–71).

If there were any doubt as to the meaning of the consent election agreement, it would have to

be resolved by reference to the Board's decisions, since paragraph 1 of the agreement provides that the election shall be held "in accordance with * * * the customary procedures *and policies* of the Board" (R. 104; italics supplied). As we have shown in our main brief (pp. 40–41), the Board's established policy is to reject post-election challenges. This policy is clearly binding on respondent in view of its participation in the consent election agreement.

Respondent's characterization of the agreement as "a snare and trap for the unwary employer" because of its alleged ambiguity (Br., p. 37), if interpreted to bar post-election challenges, can have no applicability here for respondent denies that it knew of Mrs. Kane's alleged ineligibility until after the election. If this was true, its delay in raising the challenge was not due to its misunderstanding of the agreement.

C. Respondent attempts to demonstrate that the Board's post-election challenge rule is unreasonable and arbitrary by suggesting certain hypothetical situations (Resp. Br., pp. 12–14). In resolving the issues which it raises, however, respondent erroneously assumes that the Board's rule applies only where the objecting party has knowledge of the grounds of ineligibility at the time of the election. The Board's rule respecting post-election challenges does not depend on a showing of such notice. In the ten cases applying

the rule cited in our main brief (pp. 41–42, n. 22), such notice appears in only one case. *Matter of Chrysler Corp.*, 63 N. L. R. B. 866, 868. In another case, on the other hand, it was alleged, and the Board assumed, that the objecting party had no knowledge of the asserted ineligibility until after the election. *Matter of Norris, Inc.*, 63 N. L. R. B. 502, 511–512. In the remaining eight cases, there was nothing to show that the party did or did not have such knowledge.[7] Respondent's knowledge of Mrs. Kane's alleged ineligibility in this case is, of course, another reason why the regional director's ruling was not arbitrary, the issue discussed in Point II of our main brief, pp. 60–73. But it has no bearing on the applicability of the Board's rule as to post-election challenges discussed in Point I of our main brief, pp. 27–54.

The Board's rule cannot be made to appear unreasonable by suggesting the possibility of deliberate fraud (Resp. Br., p. 12). Fraud always calls for special remedies and the cases cited in our main brief show that the Board deals with it appropriately when it arises (p. 41, n. 21). Similarly, there is no basis for respondent's assertion that the Board's rule may encourage unions to send large numbers of ineligible voters to the polls

[7] Thus respondent is in error in asserting that in its hypothetical case, Union B, under the Board's rule, would not be estopped from questioning the two non-employee votes (Resp. Br., p. 13). It would be.

in the hope that some will slip by without challenge (Resp. Br., pp. 29–30). Since the employer supplies the election list in the first instance, and since no individual can vote without challenge by the Board unless his name is on the election list, this abuse could not possibly occur.

D. Respondent insists that since the Board is authorized to conduct a "secret ballot" or to use "any other suitable method" to ascertain employee representatives (Act, Sec. 9 (c)), it has no right to insist on preservation of a secret ballot (Resp. Br., pp. 32–33). In effect this argument means that, although Congress authorized the Board to conduct a "secret ballot", it did not authorize it to keep the ballot secret after it was conducted. It requires no argument to show that this interpretation of the Act is untenable.

Respondent relies on the fact that when there are a very small number of challenged ballots which are eventually held to be valid and are therefore counted, the votes cast by a few employees may become known (Resp. Br., pp. 32–33). Since there is no way of avoiding this situation, the Board must permit it to exist. In such cases, however, the challenged voter knows that his vote may become known, and if he is disturbed by this possibility, he may refuse to vote. A post-election challenge gives the voter no such opportunity. In any case, examination of a chal-

lenged ballot is a far cry from asking a person how he voted at an earlier date, or relying on other evidence for that purpose. In the case of the challenged ballot, the vote is irrevocably made at the time of the election,* and no amount of influence by the employer, a union, fellow employees, or other friends can change it. Quite the opposite is the case when the individual is required to testify at one time about what his preference was at another time. As the record here shows, the person in question may be unable to give any reliable testimony on this score (R. 109–110). Respondent's inability to see the impropriety of seeking such evidence (see Resp. Br., p. 9, footnote) underscores its refusal to give effect to the "secret ballot" provisions of the Act. In sum, under the rule which respondent advocates, every employee would know when he went to the polls that he might be called upon later to state how he had voted. Under the Board's rule, every employee who casts an unchallenged ballot can be sure that it will never thereafter be called into question, and those whose ballots are challenged are faced only with the choice of casting a ballot which may thereafter become known or of refusing to vote at all.

Respondent's contention that there is no reason to maintain the secrecy of Mrs. Kane's ballot, if she is not an employee (Br., pp. 34–35), ignores the fact that Mrs. Kane may well have to work in

* Cf. *Matter of Gluck Bros., Inc.*, 52 N. L. R. B. 1144.

the future as a garment worker. Respondent might be hesitant to hire her again if her testimony as to how she voted displeased it. Or Mrs. Kane may be afraid such will be the case. The Board should not subject her to such risks by requiring her publicly to disclose her vote.

IV

THE BOARD IS NOT RELYING IN THIS COURT ON ANY GROUND NOT STATED IN ITS DECISION

A. The Board has asserted in this Court the validity of Article III, Section 12, of its Rules and Regulations, which make the ruling of the regional director final in a consent election (Bd. Br., pp. 54–60). Respondent asserts that the Board has not previously relied on this rule and that the finality doctrine of the Board was evolved without reference to its rules and regulations (Resp. Br., pp. 51–56). Respondent is mistaken. The Board's decision, which incorporates the trial examiner's intermediate report (R. 11), expressly relied on Article III, Section 12 (R. 27, n. 14).

B. Respondent also asserts that the Board's decision rests solely on the theory that the regional director's ruling was not arbitrary and that hence it is error for the Board to urge here (Bd. Br., pp. 27–54) that its post-election challenge rule is reasonable (Resp. Br., 20–21). The Board's decision refutes this assertion (R. 12).

In it, the Board concluded its discussion of whether or not the regional director's ruling rejecting post-election challenges was arbitrary by stating that it was "in complete accord with the established principles and policy of the Board". (*ibid.*). Immediately thereafter, in a separate full paragraph, the Board stated the basis for its consistent policy of rejecting post-election challenges (*ibid.*). On this state of the record there is no basis for respondent's contention.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

GERHARD P. VAN ARKEL,
General Counsel,
MORRIS P. GLUSHIEN,
Associate General Counsel,
RUTH WEYAND,
JOSEPH B. ROBISON,
Attorneys,
National Labor Relations Board.

NOVEMBER 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946